



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 11, 1996

Paul E. Sullivan, Esq.
The Singletary Mansion
1565 The Alameda
San Jose, CA 95126

RE: MUR 4305
Malcolm S. "Steve" Forbes, Jr.

Dear Mr. Sullivan:

On February 16, 1996, the Federal Election Commission notified Malcolm S. "Steve" Forbes, Jr., your client, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on December 3, 1996, found that there is reason to believe Mr. Forbes violated 2 U.S.C. § 441b(a), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing preprobable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that preprobable cause conciliation be pursued. The Office of the General Counsel may recommend that preprobable cause not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for preprobable cause conciliation after briefs on probable cause have been mailed to the respondent.


Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of General Counsel ordinarily will not give extensions beyond 20 days.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,


Lee Ann Elliott
Chairman

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Malcolm S. "Steve" Forbes, Jr.

MUR 4305

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission (the "Commission") by Charles J. Givens on February 12, 1996. The complaint alleges that Forbes, Inc., Forbes Magazine ("*Forbes*") and Malcolm S. "Steve" Forbes, Jr. violated 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971, as amended (the "Act"), by respectively making and accepting corporate contributions with regard to commentaries written by Mr. Forbes and carried in *Forbes* during his candidacy for U.S. President. The complaint also alleges that Forbes for President, Inc. (the "Forbes Committee") violated sections 434 and 441d of the Act by respectively failing to report the commentaries as contributions in-kind and failing to include appropriate disclaimers.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Act prohibits corporations from making a contribution or expenditure from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). *See also* 11 C.F.R. § 114.2(b), (c). Section 441b(a) also makes it unlawful for any candidate, political committee, or other person knowingly to accept or receive a contribution prohibited by section 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. For purposes of this provision, the term "contribution or expenditure" includes any direct or indirect payment, gift of money, services, or anything of value, to any candidate or

campaign committee in connection with any federal election. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.1(a)(1). Expenditures made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” 2 U.S.C. § 441a(a)(7)(B). *See also* 11 C.F.R. § 109.1(c). This includes “any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast” of a communication. 11 C.F.R. § 109.1(b)(4)(i).

The Act does not, however, completely foreclose corporate involvement in federal elections. 2 U.S.C. § 431(9)(B)(i) specifically exempts from the definition of “expenditure” “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” Commission regulations similarly exclude from the definitions of contribution and expenditure “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication . . .” 11 C.F.R. §§ 100.7(b)(2), 100.8(b)(2). According to the legislative history of this “press exemption,” Congress intended to preserve the traditional role of the press with respect to campaigns: “[I]t is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. [The press exemption] assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974), *reprinted in FEC Legislative History of Federal Election Campaign Act Amendments of 1974*, 638 (1977). *See FEC v. Massachusetts Citizens for Life*,

Inc. (“MCFL”), 479 U.S. 238, 250 (1986); *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981).

A series of tests may need to be applied before concluding that the activity in question falls within the press exemption. First, the entity involved in the activity must be a press entity as described in 2 U.S.C. § 431(9)(B)(i). See Advisory Opinions 1987-8, *Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 5890, 1980-109 (CCH ¶ 5556), 1980-90 (CCH ¶ 5538). See also *FEC v. Multimedia Cablevision, Inc.*, Civ. Action No. 94-1520-MLB, slip. op. at 6 (D. Kan. August 15, 1995), *appeal docketed*, Nos. 95-3280 and 3315 (10th Cir. Sept. 5, 1995) (referring to the need for a “qualified press entity” in applying the exemption).¹

After applying the “qualified press entity” test, the Commission must determine whether the press entity is owned or controlled by any political party, political committee or candidate. The test is a straightforward inquiry into whether the complaint, response or other data available to the Commission suggest that a media entity is so owned or controlled. If the media entity is so owned or controlled, the press exemption extends only to the costs of “news stor[ies] (i) which represent . . . bona fide news account[s] communicated in a publication of general circulation or

¹ To determine whether a medium of communication fits one of the descriptions listed in section 431(9)(B)(i), the Commission has applied the definitions of “broadcaster,” “newspaper,” and “magazine or other periodical publication” in its Explanation and Justification of 11 C.F.R. §§ 110.13 and 114.4(e). Although those regulations deal with the sponsorship of candidate debates by news organizations, the definitions in the Explanation and Justification were explicitly drafted with the press exemption in mind. See Explanation and Justification of 11 C.F.R. §§ 110.13, 114.4(e), 44 Fed. Reg. 76,734 (1979). Newspapers are “publication[s] of general circulation produced on newsprint paper which appear[] at regular intervals (usually daily or weekly) and which [are] devoted primarily to the dissemination of news and editorial opinion to the general public,” and “which ordinarily derive their revenues from subscriptions or advertising . . .” 44 Fed. Reg. at 76,735. Magazines and “other periodical publications” are “publication[s] in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, opinion and entertainment, whether of general or specialized interest. Only magazines and periodicals which ordinarily derive their income from subscriptions and advertising” are to be exempt. *Id.*

on a licensed broadcasting facility, and (ii) which [are] part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area” 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii).

The Act and the Commission’s regulations distinguish a “news story” from a “commentary” or an “editorial.” The Act covers “news stor[ies], commentar[ies], or editorial[s],” so the press exemption will protect all such material where the candidate lacks ownership or control of the media entity, obviating the need for further inquiry. The provision in the regulations that applies where ownership or control exists, however, is specifically limited to “news stor[ies].” The Commission has explained that “[u]nlike news [stories], commentaries and editorials are intended to reflect the subjective views of the publisher or broadcaster. In the context of a political campaign, commentaries and editorials tend to be partisan in nature and to be disseminated for the purpose of influencing the outcome of an election.” Informational Letter 1976-29, CCH ¶ 6907. Accordingly, commentaries or editorials contained in candidate-owned or -controlled publications are *not* protected by the press exemption, and absent strong evidence to the contrary, a candidate will be presumed to have received a contribution in-kind to influence his or her election when the candidate’s “newspaper or radio station disseminates commentaries or editorials favorable to [the candidate] or unfavorable to [the candidate’s] opponent.” *Id.*

In addition to “favorable” or “unfavorable” commentaries or editorials appearing in a candidate-owned or -controlled press entity, the Commission has held that the financing of a communication to the general public that discusses or mentions a candidate in an election-related context and is coordinated with the candidate or his or her campaign is “for the purpose of influencing a federal election.” Advisory Opinion 1988-22, CCH ¶ 5932. *See also* Advisory

Opinion 1983-12, CCH ¶ 5718. The Commission has explained that if “[s]tatements, comments or references regarding clearly identified candidates appear in [a publication] and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain ‘express advocacy’² or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute . . . in-kind contributions to the identified candidates.” Advisory Opinion 1988-22.³

B. Factual Background

Forbes, Inc. is a privately-held New York corporation primarily engaged in the business of magazine publishing. It lists nine divisions, among them the Forbes Division and Forbes Newspapers. The Forbes Division publishes *Forbes*, a biweekly magazine focusing on finance and investment founded in 1917, with a current circulation of over 777,000. Forbes Newspapers

² Under former regulation 11 C.F.R. § 109.1(b)(2), “expressly advocating” meant any communication that by its terms advocated the election or defeat of a candidate, including but not limited to the name of the candidate, or expressions such as “vote for,” “elect,” “support,” “cast your ballot for” and “Smith for Congress,” or “vote against,” “defeat,” or “reject.” The U.S. Supreme Court has determined that when a communication urges voters to vote for candidates who hold a certain position and identifies specific candidates who hold that position, such a message “is marginally less direct than ‘Vote for Smith’” but “goes beyond issue discussion to express electoral advocacy.” *MCFL*, 479 U.S. at 249. Moreover, speech is express advocacy under the Act if, “when read as a whole, and with limited reference to external events,” it is “susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). New regulations in effect October 5, 1995 expanded the prior regulatory definition to incorporate the holdings of *MCFL* and *Furgatch*. 11 C.F.R. § 100.22. *But see Maine Right to Life Comm., Inc. (“MRLC”) v. FEC*, 914 F. Supp. 8 (D. Me. 1996), *aff’d per curiam*, No. 96-1532 (1st Cir. Oct. 18, 1996) (invalidating new 11 C.F.R. § 100.22(b)).

³ The Commission has also indicated in several other instances that the absence of solicitations for contributions or express advocacy will not preclude a determination that an activity is “campaign-related” when there is coordination with the candidate or the campaign. *See* Advisory Opinions 1992-6 (CCH ¶ 6043), 1992-5 (CCH ¶ 6049), 1990-5 (CCH ¶ 5982), 1988-27 (CCH ¶ 5934), 1986-37 (CCH ¶ 5875), 1986-26 (CCH ¶ 5866), 1984-13 (CCH ¶ 5759), 1983-12 (CCH ¶ 5718).

was acquired by Forbes, Inc. in 1985 and publishes 14 weekly newspapers with a total circulation of approximately 56,000. In February 1990, following the death of his father, Malcolm S. "Steve" Forbes, Jr. became the majority stockholder of Forbes, Inc., owning 51% of the company's capital stock. The remaining 49% is owned equally by the four other Forbes siblings. Mr. Forbes is President and Chief Executive Officer of Forbes, Inc., and is Editor-in-Chief of *Forbes*. For several years, Mr. Forbes has written a column that appears to be featured in every issue of *Forbes*, entitled "Fact and Comment," with the byline "By Steve Forbes, Editor-in-Chief." It is usually two pages in length, subdivided into four to eight separate topic sections, and carried in the front part of the magazine. On November 2, 1995, Mr. Forbes took a leave of absence from Forbes, Inc. presumably to concentrate on his presidential campaign, but he continued to write his column in *Forbes*. Mr. Forbes filed a Statement of Candidacy as a candidate for the Republican nomination for the U.S. Presidency on September 22, 1995, and formally announced his candidacy on the same day.

1. The Complaint

The complaint alleges that, after declaring his candidacy for President, Mr. Forbes used his editorials in *Forbes* "to test the waters of public opinion for his political ideas, to communicate information about himself and his political beliefs to thousands of potential voters, and to promote the central themes of his presidential campaign." Mr. Forbes allegedly "increased the dissemination of these political communications by republishing each editorial in fourteen Forbes, Inc. newspapers in New Jersey" The complaint claims that the Forbes Committee has not reimbursed Forbes, Inc., *Forbes*, or the New Jersey newspapers for the cost of publishing these editorials and has not reported them as contributions or expenditures.

Specifically, the complaint avers that, since announcing his candidacy, Mr. Forbes has “authored and published at least ten editorials addressing issues discussed by the candidates in this election cycle. For example, Mr. Forbes has repeatedly used [*Forbes*] to promote his central campaign theme, the flat tax.” In the “Fact and Comment” section appearing in the October 16, 1995 issue of *Forbes*, Mr. Forbes wrote: “The way to get the economy growing as it should is to enact the flat tax. That won’t happen until after the next election.” One week later, Mr. Forbes wrote in “Fact and Comment”:

The answer is to junk the current code and enact the flat tax. The resulting simplicity would enormously increase compliance, would remove the major sources of political corruption in Washington, would set off an economic boom because people could keep more of each dollar they earned, and would eliminate barriers to job-creating investments.

Forbes, October 23, 1995, p. 23. The complaint cites examples of Mr. Forbes promoting his positions on other campaign issues, (e.g. returning to the gold standard, abortion, Bosnia, and federal term limits) and provides copies of campaign statements and various newspaper articles describing his positions on these issues.

The complaint argues that “[b]y testing political ideas and repeating campaign rhetoric in his editorials, Mr. Forbes has clearly made direct reference to and promoted his candidacy,” conduct which complainant notes the Commission concluded was “campaign-related” in Advisory Opinion 1990-5. The editorials are allegedly “impermissible corporate contributions to and expenditures made on behalf of Forbes’ campaign,” constituting violations of 2 U.S.C. § 441b(a).

2. The Response

In the response submitted on behalf of Mr. Forbes, two basic arguments are proffered to refute the charges in the complaint. First, the response urges the Commission to apply an “express advocacy standard” as articulated by courts that have interpreted the terms “contribution” and “expenditure” in the Act. From a “plain reading of the editorials in question, there are no ‘communications expressly advocating the nomination, election, or defeat of any candidate.’” According to the response, this is “a classic situation where a public figure continues to voice opinions pertaining to issues of a general nature and of a general interest to the world.” Second, the response claims that Advisory Opinion 1990-5 does not apply because its fact pattern is “dramatically different” from this matter. Mr. Forbes, unlike the candidate referred to in that Opinion, has been writing his commentary “for over 15 years, a time which was clearly prior to any inkling he may have had for his candidacy for federal office. The magazine is circulated worldwide to hundreds of thousands of people and its genesis was not the outgrowth of campaign-related activities.” The response does not address the allegation in the complaint that the commentaries in question were republished in fourteen Forbes Newspapers.

C. Analysis

As an initial matter, the press exemption does not appear to be available to Mr. Forbes or Forbes, Inc. because, although *Forbes* and the Forbes Newspapers are “qualified press entities,” they appear to be “owned or controlled” by Mr. Forbes by virtue of his 51% ownership of the corporation’s capital stock. Accordingly, the exemption would then extend only to the costs of “news stories,” as distinguished from “commentaries” or “editorials.” Although the title of Mr. Forbes’s column -- “Fact and Comment” -- does not conclusively establish its nature, a

review of the ten columns attached to the complaint appears to confirm that it is used by Mr. Forbes to “voice [his] opinions” on a wide variety of topics, as admitted in the response. Each column contains Mr. Forbes’s personal views on all subjects addressed in that column.⁴ The columns thus appear to constitute “commentaries,” and as such would not be covered by the press exemption because the publications in which they appeared are candidate-controlled. *See* 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii). However, the central issue still remains: whether the column space devoted to Mr. Forbes’s campaign themes is something of value donated by Forbes, Inc. for the purpose of influencing his election and therefore subject to the Act.

Nothing in the attached columns appears to constitute express advocacy, and there appear to be no solicitations for contributions. As noted, however, the Commission has indicated that the absence of solicitations for contributions or express advocacy will not preclude a determination that an activity is “campaign-related” when there is coordination with the candidate or the campaign. Advisory Opinion 1990-5, while not dealing with an ongoing, longstanding publication, sets forth factors relevant to whether an activity is “campaign-related” when the press exemption does not apply and there is sufficient indicia of candidate or committee involvement in the creation and dissemination of a communication. The newsletter in that Opinion was owned and financed by the candidate but did not clearly identify the owner as a candidate and did not contain solicitations for contributions or express advocacy. The Commission nevertheless held that any edition of the newsletter would be deemed to be

⁴ The only exceptions are restaurant reviews contained in the column, which appear to be written by other *Forbes* employees.

“campaign-related” and thus for the purpose of influencing the candidate’s election if: “direct or indirect reference is made to the candidacy, campaign or qualifications for public office of [the candidate or his or her] opponent”; or reference is made “to [the candidate’s] views on public policy issues, or those of [the candidate’s] opponent, or [to any] issues raised in the campaign”; or “distribution of the newsletter is expanded . . . in any manner that . . . indicates [its] utilization as a campaign communication.” *Id.*

The complaint suggests that Mr. Forbes has made “direct reference” to his candidacy by repeating his campaign themes in his magazine, but any such connection must be made in the mind of the reader as the fact of his candidacy is not discernible solely from the communications. However, at least one of the Forbes Newspapers has prominently featured a news story on Mr. Forbes’s campaign in the same issue that carried his column. The first page of the September 27, 1995 edition of *The Hills-Bedminster (New Jersey) Press* contains a large photograph of Mr. Forbes announcing his candidacy followed by the headline “Forbes is running for president: GOP candidate presents ‘A New Conservative Vision.’” In his column on the fourth page of the same edition, Mr. Forbes comments on the “destructive[ness]” of the “high capital gains tax,” which he had proposed to “zero out” in his candidacy announcement. Although the column itself does not refer to Mr. Forbes’s candidacy, a quick glance at the newspaper’s front page headline and photograph will make it clear to the reader that the author of the column (which also contains a small picture of Mr. Forbes) is also a presidential candidate.

Mr. Forbes appears to have repeatedly offered his opinions on campaign issues in his columns since becoming a presidential candidate. The primary example raised in the complaint is his promotion of the “flat tax” in at least two separate “Fact and Comment” columns. The flat

tax is closely identified with Mr. Forbes; indeed, he has championed its enactment in previous columns and specifically mentioned it several times during his formal candidacy announcement. News reports covering the Republican Presidential Primary Election regularly referred to Mr. Forbes's flat tax proposals, some even going so far as to label him "Mr. Flat Tax." Mr. Forbes has also discussed, both on the campaign trail and in *Forbes*, his positions on term limits, a gold standard, abortion, and U.S. involvement in Bosnia. If Mr. Forbes reprinted his "Fact and Comment" columns in all of the Forbes Newspapers after announcing his candidacy as alleged in the complaint, this may suggest utilization of these publications as campaign communications by increasing the distribution of the columns.

While Mr. Forbes may have written commentaries in past issues of *Forbes* that have been integrated into his campaign speeches and pronouncements, continued publication of his campaign themes since becoming a presidential candidate could be used to advance his candidacy. Also, although the distribution of *Forbes* may be "worldwide" as stated in the response, the vast majority of its readers presumably are located in the United States and are potential supporters of Mr. Forbes. His positions as CEO of Forbes, Inc. and editor-in-chief of *Forbes* and his controlling interest in the corporation's capital stock give him considerable power to control all aspects of the magazine, including its circulation, content and format. Mr. Forbes not only had complete control over the substance of his commentaries; he also apparently controlled their dissemination. Accordingly, since the press exemption does not apply, the Commission concludes Mr. Forbes's use of his column to espouse his campaign positions constitutes a "campaign-related" activity.

In Matter Under Review 2268 (Epperson, *et al.*), the candidate owned the media entity in question and therefore could not avail himself of the exemption. He had purchased a radio station and, after becoming a candidate, had used its facilities to broadcast editorials in which he discussed his positions on such topics as tax reform and U.S. foreign policy. Even though his editorials apparently did not refer to his or his opponents' candidacies, and did not contain express advocacy or solicitations for contributions, a majority of the Commission still found reason to believe that the company that owned the radio station and the candidate's principal campaign committee respectively made and received corporate contributions in-kind with regard to the broadcast of the editorials. The respondents signed conciliation agreements containing admissions of the violation, with language describing the campaign-related editorials as a "thing of value" donated by the radio station to the committee. Similarly, campaign-related commentaries carried in *Forbes* are a "thing of value" to the *Forbes* Committee, as they provided an efficient and convenient means of disseminating Mr. Forbes's campaign positions to several hundred thousand potential voters. Because of the candidate's direct involvement in the creation and dissemination of the campaign-related communications, the Commission concludes that an in-kind contribution occurred.

III. CONCLUSION

Mr. Forbes was personally involved in creating and disseminating the commentaries; therefore it appears that he knowingly accepted and consented to in-kind corporate contributions. Accordingly, there is reason to believe that Malcolm S. "Steve" Forbes, Jr., personally and as an officer of Forbes, Inc., violated 2 U.S.C. § 441b(a).